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In The

Supreme Court of the United States

CARLA B. BOONE,

Petitioner,

v.

JOHN D. JACKSON, PROFESSIONALLY KNOWN AS FABOLOUS, PHARELL L. WILLIAMS, CHARLES E. HUGO, ELEKTRA ENTERTAINMENT GROUP, INC., DESERT STORM RECORDS, INC., EMI APRIL MUSIC, INC., EMI BLACKWOOD MUSIC PUBLISHING, INC., J. BRASCO PUBLISHING, INC., ALSO KNOWN AS D. BRASCO, WARNER MUSIC GROUP, INC., AND WEA INC.,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

CARLA B. BOONE
c/o HOLLA'BACK RECORDS, ENT. . . LLC
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QUESTIONS PRESENTED FOR REVIEW[1]

1. When detailed and specific evidence presents triable issues of fact in a copyright case, when is it appropriate for the Courts to, subjectively, rule on some fact issues and subsequently avoid ruling on others thereby denying Plaintiffs' Seventh Amendment right and specific request for a jury trial in an originality case?

2. When is it appropriate to use any portion of expert testimony to affirm a Motion for Summary Judgment? Further, when is it appropriate to use any portion of expert testimony to make legal determinations regarding copyright law on a Motion for Summary Judgment?

3. How do we cease the recurring tactic of Defendants' intentionally delaying/avoiding trial by tactically misusing and over using the "one size fits all" defense of "common phrases are an unprotectable?" How do we, objectively: a) determine the specific point in time a given phrase is deemed "common"; and b) ensure consistency in the application of a District's "on point"/precedent and landmark cases and prevent the substitution of such cases with foreign cases used to affirm certain Summary Judgment Motions when such defense is claimed?

4. Once prejudicial legal errors are admitted by the Court of Appeals and the Appeals Court, subsequently, makes additional prejudicial errors, when is it incumbent upon the Courts to grant Plaintiffs their basic civil right to present these material fact issues to an unbiased jury of Plaintiffs' peers?

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[1] "Reasons for Granting Petition" will reflect each of these Questions in the numerical order presented.

QUESTIONS PRESENTED FOR REVIEW – Continued

5. When is it appropriate for a Court to ignore a conflict of interest charge when such charge was made prior to a decision being rendered in a given case?

6. When the Court of Appeals cites and corrects an admitted legally fatally flawed District Court opinion, when is it appropriate to deem such opinions as "unpublished?"

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

CARLA B. BOONE, an individual, on behalf of herself and the millions of independent music labels and artists in this class similarly situated;

JOHN D. JACKSON p/k/a "Fabolous;" PHARRELL L. WILLIAMS; CHARLES E. HUGO; ELEKTRA ENTERTAINMENT GROUP, INC.; DESERT STORM RECORDS, INC.; EMI APRIL MUSIC, INC.; EMI BLACKWOOD MUSIC PUBLISHING, INC.; J BRASCO PUBLISHING, INC.; WARNER MUSIC GROUP, INC.; and WEA, INC.

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OPINION BELOW

The Court of Appeals for the Second Circuit entered its judgment on November 15, 2006. Appendix App. 1. Petitioner Carla B. Boone seeks review of that judgment on a writ of certiorari.

BASIS FOR SUPREME COURT JURISDICTION

On December 1, 2006, Carla B. Boone timely filed a petition for rehearing in the Court of Appeals. On March 14, 2007, the Court of Appeals filed an order denying the petition for rehearing . The present petition is timely filed under 28 U.S.C. § 2101c and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment VII, Right to Jury Trial in Civil Cases.

STATEMENT OF THE CASE

In 1998, Carla B. Boone established and subsequently trademarked Holla'back Records, an independent recording label.

In January 1999, Boone, as publisher for Holla'back Records, entered into an exclusive songwriter contract

with songwriters Trilain A. Smith and Anthony Wells. Professionally, Wells and Smith use the recording/ performing name of "Trajik" for their duo. The grant under that contract expressly assigned to Boone as publisher all rights and interests in all words, music and arrangements of musical compositions written or composed by Trajik.

In or about January 1999, Trajik (namely, Wells and Smith) wrote and copyrighted the work in question. Boone produced the recording of Trajik performing the copyrighted work, which resulted in the version of the copyrighted work that Boone commercially released on compact disc, tape cassette and vinyl through the Holla'back Records label later in 1999. This commercially released version of the copyrighted work was filed for registration with the U.S. Copyright Office as per the SR registration annexed as Exhibit B of the Amended Complaint filed with the Southern District September 30, 2004 which specifically demanded a jury trial on the material fact issues of this case.

Boone subsequently promoted and marketed this commercial release to numerous major/independent labels through her entertainment attorney, Wallace Collins, and through thousands of independent sources throughout the five boroughs within New York and hundreds of college/ commercial radio stations throughout the United States.

In or about September 2001, defendants Desert Storm and Elektra released an album entitled Ghetto Fabolous, of defendant Fabolous' various musical/rap compositions and performed by Fabolous.

Fabolous' Ghetto Fabolous album included Fabolous' song (which was, purposely multi-titled) Young'n/Young'n

(Holla back)/Holla back Young'n (the Infringing song), which Fabolous co-authored with defendants Williams and Hugo.

Fabolous' recording of the Infringing song became a major international success and resulted in significant sales of the Ghetto Fabolous album, making it a "platinum" album, which signifies sales of over 1,000,000 copies.

The substantial similarities between Fabolous' Infringing song and the Copyrighted work was such that upon the release and broadcast of Fabolous' Infringing song, plaintiff Boone and Holla'back Records received numerous calls from persons congratulating Boone on the success of the song. Apparently, many of the callers confusingly believed that Fabolous had recorded the original Copyrighted work written by Trajik.

Plaintiff protested the infringement and hired an expert musicologist, Judith Finell, who concluded in her report that there were substantial similarities between the Fabolous version of Holla back and Plaintiff's and even stated that a "musical fingerprint" proving copying existed. (Appendix for Pro-Se Plaintiff-Appellant – A-46).

This case was initially filed in the U.S. District Court in New York on or about November 3, 2003.

An Amended Complaint was filed to incorporate the Sound Recording (SR) for the song of the same title and a Certificate of Registration was issued. On or about December 16, 2004, Defendants moved to dismiss this case by submitting their Motion for Summary Judgment.

On June 30, 2005, the District Court issued its Memorandum and Order granting summary Judgment for Defendants (Appendix A App. 9).

Plaintiff Boone filed a timely Notice of Appeal on October 18, 2005.

Oral argument took place on October 19, 2006.

U.S. Court of Appeals entered an "unpublished" judgment affirming the admitted legally, fatally flawed decision of the District Court on November 15, 2006.

Plaintiff Boone then filed a timely petition for rehearing on December 5, 2006.

An order was then filed denying motion for Petition Rehearing on March 15, 2007.

REASONS FOR GRANTING THE PETITION

1. The Seventh Amendment of the U.S. Constitution specifically states:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.
>
> The primary reason for our forefathers' affinity toward jury trials rather than decision making at the hands of those solely in charge of making such decisions was that they felt that the core purpose and rights within a democracy would clearly be jeopardized by not having the jury try such cases. See Article I, Section 8, Clause 8 of the United States Constitution, providing that "the Congress shall have power . . . to promote the progress of science and useful arts, by securing for

limited times to authors and inventors the exclusive right to their respective writings and discoveries." In addition, the 7th Amendment to the Constitution of the United States provides for the right to jury trials in civil matters; including originality cases.

The proceedings in the instant case, Boone v. Jackson et al, prove, unequivocally, that the forefathers' concerns were justifiable and warranted.

"Composition and Functions of Civil Jury – Traditionally, the Supreme Court has treated the Seventh Amendment as preserving the right of trial by jury in civil cases as it "existed under the English common law when the amendment was adopted." The right was to "a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts and (except in acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence." Decision of the jury must be by unanimous verdict. In *Colgrove v. Battin*, however, the Court by a five-to-four vote held that rules adopted in a federal district court authorizing civil juries composed of six persons were permissible under the Seventh Amendment and congressional enactments. By the reference in the Amendment to the "common law," the Court thought, "the Framers of the Seventh Amendment were concerned with preserving the right of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury."

The Amendment has for its primary purpose the preservation of "the common law distinction between the province of the court and that of the

jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court." But it "does not exact the retention of old forms of procedure" nor does it "prohibit the introduction of new methods of ascertaining what facts are in issue" or new rules of evidence. Those matters which were tried by a jury in England in 1791 are to be so tried today and those matters which, as in equity, were tried by the judge in England in 1791 are to be so tried today, and when new rights and remedies are created "the right of action should be analogized to its historical counterpart, at law or in equity, for the purpose of determining whether there is a right of jury trial," unless Congress has expressly prescribed the mode of trial.

Courts in Which the Guarantee Applies – The Amendment governs only courts which sit under the authority of the United States, including courts in the territories and the District of Columbia, and does not apply generally to state courts. But when a state court is enforcing a federally created right, of which the right to trial by jury is a substantial part, the States may not eliminate trial by jury as to one or more elements. Ordinarily, a federal court enforcing a state-created right will follow its own rules with regard to the allocation of functions between judge and jury, a rule the Court based on the "interests" of the federal court system, eschewing reliance on the Seventh Amendment but noting its influence."[1]

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[1] http://caselaw.lp.findlaw.com/data/constitution/amendment07/01.html#f12

As a general rule, infringement is a question of fact. *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985). However, summary judgment is appropriate if the court, drawing all reasonable inferences in favor of the non-moving party concludes that no reasonable jury could find for infringement. *Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 39 n.8 (1997).

Summary Judgment, on the other hand, was put in place to prevent unnecessary trials when there are **no fact issues** in dispute. However, it is axiomatic that summary judgment under F.R.C.P. Rule 56(c) should not be allowed in favor of a defendant accused of copyright infringement unless ***the entire record*** (not selective, reinterpretations/snippets thereof) being reviewed shows ***that there are no genuine issues as to any material fact*** and that the moving party is entitled to Summary Judgment as a matter of law. Summary Judgment should only be granted if no reasonable trier of fact could find in favor of the non-moving party. *Gallo v. Prudential Resid. Servs.*, 22 F.3d 1219, 1223 (2d Cir. 1994).[2] The burden of demonstrating the absence of a genuine dispute as to a material fact rests with the moving party *Shade v. Housing Auth. of New Haven*, 251 F.3d 307, 314 (2d Cir. 2001). *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Grady v. Affiliated Central Inc.*, 130 F.3d 553, 550 (2d Cir. 1997). In determining whether there is a genuine issue as

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[2] Note Judge Daniels' subjective opinion and deviation from this standard in the District Court's opinion dated June 30, 2005 (Memorandum and Opinion Order – Appendix App. 18) "It is unlikely that an ordinary observer would regard Plaintiff's song Holla'back and Defendant's song Young'n as aesthetically similar . . . "

to any material fact, "the evidence of the non-moving party is to be believed and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The Second Circuit recognizes the term probative similarity as the standard for determining, as a matter of fact, that the similarities show actual copying. When access has been conceded, a lower standard of proof is required (probative similarity). The posthumously published article by the late Alan Latman, Esq. clearly and definitively stipulates the clear distinction to be made between "probative" and "substantial similarity in the article titled "Probative Similarity As Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement," 90 Columbia Law Review 1187, 1189-1190 (1990) (herein Probative Similarity). These distinctions are essential in understanding and applying the appropriate standards to be used, especially when questions of the constitutional right to a trial by jury are at issue.

Access was conceded in the instant case. Therefore, the bar for ruling on probative similarity should have been significantly lowered. However, the Court of Appeals ignored this specific and important directive and, subsequently ruled that there was no probative similarity despite: 1) the exact same rhythmic utterance of the most important word in the song (the "Holla back" hook); 2) repeated and recurring, over and over and over again; 3) every 6 beats; 4) to the same syncopated rhythm (another error by Appeals Court; Court lumped the Holla'back utterance together with the syncopated rhythm which is clearly prejudicial error as these are 2 separate and distinct similarities); 5) through the exact same number of measures (16); 6) through out the entire chorus of each

song; 7) with substantially similar instruments; 8) and the intentional and deliberate alternate titles of song used by Defendant Young'n in some media and Young'n (Holla'back) in others to avoid the inevitable, appropriate and direct association with Plaintiff's song Holla'back; 9) each playing one single note exactly three times throughout entire song; 10) in the exact same tempo; 11) and essentially in same key and structure (*R.* Brief for Pro-Se Plaintiff-Appellant (Revision) 41-48, 59-60).[3]

The District Court, appropriately, moved directly to the Substantial Similarity portion of this analysis, yet then confused the distinction between probative and substantial similarity and misused/misinterpreted the precedents stipulated in its very own opinions in granting Summary Judgment on behalf of Defendants. (*R.* Brief for Pro-Se Plaintiff-Appellant (Revision) 35-36(d); *Tr.* 28 (j) letter – Exhibit I).

Summary Judgment standard stipulates "Courts must view the evidence and reasonable inferences in the light most favorable to the non-moving party." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Moreover, a Court must assume the truth of the non-movant's evidence. *Repp v. Webber*, 132 F.3d 882, 890 (2d Cir. 1997). "In other words, is there a slightest doubt as to the facts presented." *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946). In deciding a motion for summary judgment, the "fundamental maxim" is that the court "cannot try issues of fact; it can only determine whether there are issues to be tried." *Donahue v. Windsor*

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[3] *R.*___ will refer to the record in the District Court and *Tr.* __ will refer to the record in the Second Circuit Court of Appeals.

Locks Bd. of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987) (quoting *Heyman v. Commerce & Industry Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975).

As you will agree, there is a clear distinction between ruling on issues of fact and determining that a party could not prevail (i.e. no reasonable juror could find in favor of Plaintiff). Both Courts have not, clearly, made this important distinction.

Additionally, the Court of Appeals, subjectively, refused to rule on one of the most important issues in the instant case: Issue 1 of III Brief for Pro-Se Plaintiff-Appellant (Revision) *R.* 20-22: an appropriate and correct interpretation/application of the jurisdictional prerequisite requirements for filing an infringement action. Plaintiff clearly demonstrated Defendants' intentional misrepresentation of legal facts (and the District Courts continued reliance and acceptance of these legal misstatements as facts in his fatally flawed legal opinion). (Brief for Pro-Se Plaintiff-Appellant (Revision) *R.* 20-23). The misstatement that "Plaintiff could not sue" for the Sound Recording copyright filed subsequent to the original registration was contrary to Defendants very own Newsletter (*R.* Appendix A-6 for Pro-Se Plaintiff-Appellant, IP & InternetLaw @Manatt) which supported and definitively proved their full knowledge of the law in addition to their intentional misrepresentations. Plaintiff proved that she could, indeed, sue for the additional similarities included in the Sound recording registered subsequent to and included in her Amended Complaint approved by Defendants.

Four of the nine similarities that exist between Plaintiff's Holla'back and Defendants' Young'n (Holla back) were included in the Sound Recording of Plaintiff's

song. Therefore, for the Court of Appeals to refuse to, definitively, rule on this issue disregards essential fact issues of similarities in analyzing this case and again demonstrates the one-sided nature of the entire proceeding.

In fact, and most importantly, one of the most significant similarities included in the Sound Recording is the "musical fingerprint" referenced in the original expert report which was used as the basis for filing the copyright infringement action (the Preliminary report submitted by Judith Finnel *R.* Appendix A-46 for Pro-Se Plaintiff-Appellant) which specifically and definitively stated the following (Defendant-Appellees' Appendix, Exhibit A-94) "Fabolous contains a possible musical "fingerprint" suggestive that copying occurred in the sense that a similar, distinctive, feature is present in both songs. This distinctive feature, an "echo effect, in 'Fabulous' is the phrase 'back, back, back,' which similarly occurs in 'Trajik.' When a variation or departure from the initial statement of a phrase ('holla back') is similar in 2 songs, this is further evidence that copying is likely to have occurred."

Prejudicial error in denying consideration of this material fact issue is clearly reversible error as probative similarity was clearly stipulated by one of Plaintiff's musicologists yet completely ignored by both Courts.

Tr. Exhibit III-28(j) letter – Validity of SR Registration clearly demonstrated that this Circuit recognizes that Plaintiff could, indeed, sue, for the subsequent copyright filing of the SR. This very same issue was confronted and addressed in *BMS Entm't/Heat Music LLC v. Bridges, et al.*, No. 04 Civ. 2584 (PKC), 2005 WL 1593013 (S.D.N.Y. July 7, 2005). This very Circuit granted Plaintiff leave to

amend their Complaint to attach SR as "granting such leave would neither be surprising nor prejudicial." Again, Plaintiff Boone had her SR recorded, filed and accepted by Copyright offices (as well as by Defendants), yet, the Appeals Court, curiously, refused to rule on this issue.

It is important to realize that, once Defendants remove the Sound Recording from the copyright Complaint, the "musical fingerprint" proving copying is completely eliminated.

Hence, the most definitive, clear and convincing evidence that both Courts have ruled on this and every other issue in this particular case in the light most favorable to Defendants, not Plaintiff! This action is contrary to the directive . . . "the evidence of the non-moving party is to be believed and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 225.

2. In the instant case, the Court of Appeals (coincidentally, like the District Court) went into the trial record of ***only 1*** of the 2 experts presented by Plaintiff (and ignored Defendants' experts' answers to these exact issues and the "musical fingerprint" referenced in (1) above and paraphrased a small portion of that testimony to inaccurately reflect that testimony in support of affirming a legally, fatally flawed Summary Judgment Motion.

"Appellate law deals mainly with what judgments are appealable, how appeals are brought before the court, what will be required for a reversal of the lower court (e.g.,

a showing of 'abuse of discretion,' clear error," etc. . . .)[4] The Court of Appeals confirmed clear judicial error and Boone has additionally proven abuse of discretion in the instant case.

Here are the exact questions posed to Dr. Ramsey followed by his ***exact*** answers (taken directly from the testimony; not paraphrased) to this issue which is wrongfully being used to dismiss this case:

> Q: You're not contending that the writer of plaintiff's song ***created*** the rhythmic pattern of saying the word in an eighth note, eighth note, quarter note pattern?
>
> A: I'm not contending that
>
> Q: And that's because you've heard it spoken that way in normal speech
>
> A: It's because it is one of the ways in which one could express it. And therefore, in my view, the rhythmic utterance itself, in and of itself, could not be claimed as original.

Any judge versed in copyright basics and committed to, fairly, interpreting deposition testimony in accordance with copyright law knows that originality, **by the copyright definition**, does not require novelty! "Originality" does not mean that the work for which copyright protection is sought must be either novel or unique; nor does its definition require "creation." The copyright definition of originality simply requires that a work is not copied from

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[4] What is Appellate Law –www.courts.state.mn.us/districts/fifth/Appellate_Law.htm.

pre-existing works;[5] a work that comes from the exercise of the creative powers of the authors mind, in other words, the fruits of the author's intellectual labor. U.S. Const. Art. 1 § 8, cl.8. Only a dash of originality will do. Originality in music "may lie in extreme simplicity." *Yankwich Law of Intellectual Property*, 11 F.R.D. 457, 484 (1951). Both Originality and Independent creation were proven in *R.* Appeal from the District Court 25-27; *R.* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, Items 10-13; Exhibits H-K. In fact, the Defendants' self professed "expert in music copyright law" Dr. Lawrence Ferrara, clearly stated that the ⅛ note, ⅛ note, quarter note, could be original music expression (*R.* Deposition LF: 111 251 112 1-12) (*Tr.* Defendant-Appellees' Appendix, Exhibit A-429-432).

Both Courts selectively chose to ignore this essential statement; yet only referred to Dr. Ferrara's deposition testimony when it concurred with their citing of the

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[5] **Pre-existing works** denotes that **prior art** should be referenced to determine originality (which is essential in determining whether "actual copying took place"). However, the Court of Appeals referenced the "mainstream and widespread **use of 'Holla back' ... at or around the same time** Plaintiff's song was recorded." Yet prior art showed only 4 uses of the word and none had even 2 of the 9 elements shared by only Plaintiff and Defendant. In fact, Defendants did not prove that copying took place therefore presumption of originality should stand. In fact, out of over 50 comparisons of songs with this term included in the song, the only 2 that share all 5 admitted similarities of the 9 (including the musical fingerprint noted by the expert Judith Finnell, were Plaintiff's Holla'back and Defendant's Young'n (Holla back) (Exhibit I & J of TR: Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ¶¶ 11-12.

"differences" between the pieces in support of granting Summary Judgment.[6]

Dr. Ferrara's admission above, clearly, acknowledges that a disputed issue of a material fact (originality) exists if it is not ignored. Yet, contrary to Summary Judgment standard noted in (1) above: (a) these and all issues are being viewed in the light most favorable to Defendants and (b) the entire record is not being reviewed; only selective portions of the record which would lean toward granting/affirming Summary Judgment for Defendants. To use part of Dr. Ramsey's statement to dismiss this case by blatantly and inaccurately insinuating that Dr. Ramsey conceded that the rhythmic phrase is not **original**, in accordance with the **copyright definition**, is disingenuous and legally misrepresenting a material fact in this case. Clearly, Dr. Ramsey's statement, in its proper context (and in the light most favorable to the non-moving party), meant that since the writer did not create the rhythmic utterance, it is not NOVEL (*R.* Deposition Testimony GR: 14 9) This very statement was, also, unlawfully, used by the District Court in originally granting Summary Judgment for Defendants in its admitted, legally and fatally flawed substantial similarity analysis (the only portion of the test necessary since Defendants conceded access and 2½ pages of musical and lyrical similarities exist in the quantitative and qualitative portions of the songs in question. (*Tr.* Defendant-Appellees' Appendix, Exhibit J A-474-478).

Only when Plaintiff correctly pointed out in her brief, that such testimony is irrelevant in the substantial similarity portion of the analysis did the Court of Appeals,

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[6] App. 18 & 19 footnotes 7 & 8.

coincidentally, use *this very same* ***snippet*** *of testimony* and, conveniently, transfer it to the probative similarity analysis.

It was then used to improperly rule that there is no probative similarity between the 2 songs in question.

However, as pointed out in the Revision of the original Brief for Pro-Se Plaintiff-Appellant (Page 30), in *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004)[7] the United States Court of Appeals stated that "***a musicologist is not an expert on what the term 'idea' means under the copyright laws***. Labeling something as a 'musical idea' does not necessarily bear on whether it is also an 'idea' under the copyright laws and unprotectable for that reason."

Therefore, this same argument would hold true for Dr. Ramsey's expert testimony: **a musicologist is not an expert on what the term "original" means under the copyright laws**. And viewed in the proper context and drawing all reasonable inferences in the non-movant party's favor, this misinterpretation of his testimony should have been rejected!

Thus the question for this Court:

> When can terminology used by a musicologist be used as the legal basis for defining copyright law in support of granting/affirming a Motion for Summary Judgment?

3. The primary tactic used by Defendants in copyright cases (especially in those involving rap songs) is the

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[7] App. 24.

"one size fits all" defense stipulating that the phrase is too "common" to be protectable. This tactic is often used by Defendants with unlimited resources in an attempt to delay the timely processing of the claim and to win the war of attrition game causing the escalation of Plaintiff's legal bills when attorneys are involved. Plaintiff Boone spent in excess of $100,000 of her families hard earned monies defending this copyright claim against intentional, unlawful, legal misstatements by officers of this Court (Defendants) only to have the case, unfairly, dismissed by both the District and Court of Appeals.

Copyright functions as an engine of free expression and regulates this expression rather than the ideas. The entire musical expression of the most important portion of the rap song "Holla'back" was at issue (the rhythmic utterance of phrase, repeated every 6 rests, in ⅛ note, ⅛ note, ¼ note, to a distinct syncopated rhythm, repeating over and over again, to substantially similar instruments, through the exact same number of measures (16) etc. Out of the 4 ***prior art*** pieces on record and the additional 40+, none of these songs have even 2 of these similarities other than Plaintiff and Defendant. If no one ever used these elements together, how could Plaintiff copy such expression? Thus originality was clearly proven yet selectively ignored.

As indicated in *Tr.* Exhibit I of Plaintiff's 28(J) letter, two significant Copyright Motions for Summary Judgments were submitted to the Second Circuit within days of the instant case with the exact same issues addressed in each case:

These cases included:

1) *Vargas & Roberts v. Pfizer* – Case No. 049772 (WHP) – a *one minute*, identical drum loop, repeated 27 times, with high hat, cymbal, snare & bass drum – defendants didn't prove that Plaintiff copied this "common" piece (regardless as to how many other pieces this selection appears – Summary Judgment denied October 26, 2005 (approximately 90 days after Boone's case was dismissed)

2) *BMS Heat Music v. Bridges, et al.* – Case 042594 (PKC) – Defense claimed that 2 words "like that" too "common" to be protectable (unoriginal). Summary Judgment denied July 6, 2005 (approximately 6 days after Boone's case was dismissed)

Boone's Summary Judgment was granted *June 30, 2005*.

Summary judgment was denied in both of these cases despite Defendants' "one size fits all" claim that plaintiffs' works lacked sufficient originality to be protectable and also lacked substantial similarity.

These 2 cases contained significantly less similarities than the instant case, yet Summary Judgment was denied. These cases also quoted many of the same "precedent" setting cases quoted by the Plaintiff in the instant case, which clearly supported the fact that that Summary Judgment should have been precluded in Boone's case: *Statchborneo v. ARC Music Corp.*, 357 F.Supp. 1393, 1405 (S.D.N.Y. 1973), *Jean v. Bug Music*, 2002 WL 287786, *6 (S.D.N.Y. Feb. 27, 2002); *Santrayall v. Burrell*, 39 U.S.P.Q.2d 1052, 1996 WL 134803 (S.D.N.Y. 1996); *Knitwaves, Inc. v. Lollywogs, Ltd.*, 71 F.3d 996, 1004 (2d Cir.

1996). Additional cases, quoted by Plaintiff *Tr.* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, A403, included: *Bright Tunes Music Corp v. Harrisongs Music, Ltd.*, 420 F.Supp. 177, 178 (S.D.N.Y. 1976), aff'd, *Abkco Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983); *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*, 30 U.S.P.Q.2d 1791, 1793, 1994 WL 6230 (S.D.N.Y. 1994); *Levine v. McDonald's Corp.*, 735 F.Supp. 92, 96-98 (S.D.N.Y. 1990).

Santrayall v. Burrell was not only in the same circuit but was "on point" as it included the same, exact, scenario: a common word (uh-oh; which has been in existence far longer than "Holla'back"); rapped in ⅛ note, ⅛ note, quarter note (the same pattern as Holla'back); repeated (just like the word Holla'back); to a distinct rhythm (syncopated, just like "Holla'back"). (*Tr.* Petition for Rehearing . . . p. 4)

Therefore the question before this court:

> If the same facts, presented to different judges, within same circuit, yield different results, how can anyone truly get justice?

Clearly, if the 2nd Circuit has recognized a ***one measure*** drum beat as being legally original enough to withstand Summary Judgment, can the Courts designate a specific standard which would prevent Defendants, in this Circuit, from delaying the timely and proper administration of justice in cases with at least this level of similarity (and, certainly those, such as the instant case, with far more similarities duly noted)?

An occasional review of these cases by the Supreme Court is essential in ensuring that the fair, unbiased and consistent administration of justice is being adhered to.

When and who, accurately and legally designates a specific word as "common"? "Further, how does some common words (uh-oh, I Love etc.; words clearly in use since the beginning of time and unequivocally more common than Holla'back) be deemed sufficiently original and protectable, in this circuit to withstand Summary Judgment while, a new phrase, which divulged only four prior usages (yet none with all 9 similarities ***either*** prior to or subsequent to Plaintiff's release) is deemed too "common" ? Is a word deemed "common" simply because a well known, nationally distinguished and prominent law firm and the District/Appeal Courts proclaim them to be so?

Or, does the evidence of record, Second Circuit legal precedent and principals of law formulated for applying the law become the more appropriate and most objective (legally appropriate) way to view this information?

Further, the facts surrounding a landmark copyright case, also out of circuit yet disregarded by the Court of Appeals, which Plaintiff quoted *Three Boys Music Corp. v. Michael Bolton*, 212 F.3d 477 (9th Cir. 2000) yet, acknowledged that this case clearly supported Plaintiff's position. In fact *Tr.* Appeal from the United States District Court p. 49 stated that Bolton pointed out that 129 songs had the same title "Love is a Wonderful Thing" registered with the Copyright Office, 85 of them before Bolton's copyright in 1964 (96% more songs with common lyric; yet was found to be protectable). It is true, of course, that a combination of unprotectable elements may qualify for

copyright protection. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir. 1994). "Originality may be found in taking the commonplace and making it into a new combination or arrangement." See also *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002). The particular sequence in which an author strings together a significant number of unprotectable elements can itself be protectable. Each note, in a scale, for example, is not protectable, but a pattern of notes in a tune may earn copyright protection."[8]

Additionally, both Courts referenced the dissimilarity of the non-essential part of the song, the verses, in support of either granting and subsequently affirming the Summary Judgment motion is completely contrary to and in direct conflict with the Court of Appeals' decision in *Swirsky v. Carey*. *Swirsky v. Carey* also had dissimilar lyrics, yet was remanded back to the District Court.

Thus the questions before this Court:

> Is judicial precedent binding? How do we ensure that Courts, within the same Circuit, are applying their very precedents uniformly and not interchanging them with foreign cases to achieve desired results or completely ignoring precedent altogether?

Interestingly, the Court of Appeals also ignored each of these cases, within its very own Circuit, and replaced them with a completely dissimilar foreign (1st Circuit) case (*Johnson v. Gordon*, 409 F.3d 12, 18 (1st Cir. 2005) where: a) substantial similarity was at issue; b) the 1st Circuit substantial similarity guidelines are clearly

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[8] http://www.law.cornell.edu/copyright/case/323_F3d_805.htm.

different and more stringent than the 2nd Circuit; and c) access was conceded in *Boone v. Jackson, et al.*, 2006 WL 3327058 (2d Cir. Nov. 15, 2006). The Court of Appeals did not acknowledge this extremely critical concession made by Defendants and therefore used a higher standard in their probative similarity analysis placing Plaintiff, once again, in a legally flawed and disadvantageous position.[9] Of course, if a court is looking for a reason to dismiss any given case, the court can certainly find such reason by pulling snippets from the numerous cases cited throughout the U.S. and use these snippets to accomplish their objective. However, if there are a host of cases, within your very circuit with exactly the same/similar circumstances, and several tried within days of your case, why would you look outside of your district for assistance in interpretation and decision making?

However, the Court of Appeals was "mindful that probative similarity does permit the dissection of the work on other grounds (Appendix App. 5, Footnote) ... and discussing the relationships to other *earlier works*; yet looked at works of Plaintiff "*at or around the time*" Plaintiff recorded song. This subjective application by the Court of Appeals is, clearly and completely contrary to the very standard articulated in its very footnote as "the relationships to other earlier works" clearly refers to determining

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[9] *Knitwaves, Inc. v. Lollywogs, Ltd.*, 71 F.3d 996, 1004 (2d Cir. 1996), the Second Circuit suggested that the dissection test may not fully resolve the legal issues where the copyright holder claims that the copyrighted material is essentially a host of uncopyrightable individual elements that have been arranged in a unique way that qualifies them for copyright protection. *Cf. Feist Publications, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340 (1991) (copyright available for compilations of unprotectible facts).

whether Defendants can prove the fundamental issue of originality: did Plaintiff copy the portions of song in question?

"Whether you can stop someone else from using your literary phrases is dependent upon the uniqueness and value of the phrases as well as the way in which you (and the borrower) use them."[10] ***Here lies the crux of our case! The unique way in which only Plaintiff and Defendant chose to string together several, conscious musical choices, while Holla'back was rapped in the same 1/8 note, 1/8 note, 1/4 note, then repeated (every 6 beats by only Plaintiff and Defendant out of over 50 songs reviewed) to a distinct (syncopated) rhythm, playing one distinct note, with substantially similar instruments, in the exact same number of measures. . . . etc., clearly deems the entire*** musical expression protectable. How many more similarities does one need?

The "value" of the hook is undisputable; it is the most important part of the song.

Judges cannot be allowed to disregard principles of law and/ignore/interchange precedents at will or act like these principals do not exist in an effort to receive desired results for certain Defendants.

4. Clearly, the continuous prejudicial legal errors, by both Courts, accompanied by the clearly stipulated, inconsistent rulings within the Second Circuit requires a review at the highest level to ensure that justice is being

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[10] I May Not Be Totally Perfect But Parts of Me Are Excellent: Copyright Protection for Short Phrases By *Richard Stim, J.D.* http://fairuse.stanford.edu/commentary_and_analysis/2003_09_stim.html.

administered on a fair, consistent and impartial basis. When such errors are, continuously, made by both Courts, the Plaintiff in such cases should, automatically, be granted a writ of certiorari to ensure the proper and just administration of justice for the Plaintiff. Here is a list of all errors made in the given case which requires that such writ be granted: 1) District Court's confusion between substantial/probative similarity and the misapplication/ misunderstanding of the significant differences between the 2 at the 2 distinct points in the analysis; 2) District Court's misreading and applying heightened ordinary observer test in the 2nd Circuit; 3) District Court agreeing with Defendants' intentional misstatement and blatant material misrepresentation that Plaintiff "could not sue" for the Sound Recording. The Sound Recording included additional similarities (including the Musical fingerprint indicative of copying referenced in the initial expert report). Defendants published their very own Newsletter confirming that they were well aware that this representation was false;[11] yet even the Court of Appeals left this question unresolved by stating that the jurisdiction issue "would not affect the analysis . . . ," thereby countering the expert's opinion with their own subjective assessment. The originality of this piece included 4 additional musical/ lyrical similarities found in the Sound Recording and are critical to the substantial and probative similarities between these 2 pieces. Failing to use both versions of the song in the analysis is clearly prejudicial error as both songs were included in the Amended Complaint approved by Defendants and clearly proves the one-sided, subjective

[11] IP & InternetLaw@Manatt, Volume III, Issue 15, *Tr.* Exhibit A-6 http://www.manatt.com/newsevents.aspx?id=3820&folder=24.

nature of the entire analysis of this copyright case. Subjectively deciding what issues to consider should not be within the Court's purview. The Court should have simply decided if there were issues to be tried, not to try the issues; 4) Using out of Circuit cases which are inapplicable and ignoring precedent within this very circuit; 5) The District Court's improper use of the more discerning ordinary observer test – a practice discouraged in the 2nd Circuit; 6) The Court of Appeals combining the musical similarity of the Holla'back rhythmic utterance (⅛ note, ⅛ note, ¼ note) with the syncopated rhythm; two separate, distinct and critical similarities listed as one single similarity; 7) The Appeals Court not acknowledging that access has been conceded in the instant case.

5. As indicated in the *Tr.* Petition for Rehearing filed December 4, 2006, Plaintiff Boone raised the question as to whether judicial abuse of authority was taking place: 1) in affirming an admitted, legally fatally flawed District Court analysis and due to additional errors made by the Appeals Court in which material fact issues were ignored/ continuously being re-tried at the Appeals level and 2) the total and complete disregard of precedent and on-point cases in this very District and landmark cases outside of the District which proved Plaintiff's originality claim.

Included in the Petition for Rehearing, Plaintiff questioned the potential judicial abuse of authority due to the one-sided nature of all rulings in the case. Plaintiff Boone, after filing rehearing Request, began an extensive process of researching relationships between Defendants/ law firms and the Courts.

Plaintiff, shockingly, found that, two months after Boone's case was dismissed by the Court of Appeals,

Defendants appointed Kimo Peluso, Esq. as one of several new Partners to the law firm representing Defendants in the instant case. Coincidentally, Mr. Kimo Peluso was the former law clerk for one of the three Appellate judges (Amalya Kearse)[12] who ruled against Plaintiff on her Appeal; thus confirming Plaintiff's suspicions regarding the one-sided nature of all legal decisions weighing more heavily toward defendants which were contrary to every legal precedent and standard used and documented in ruling on previous copyright cases in this same Circuit!

As noted below, here are some of the roles and responsibilities of law clerks:

Roles and Responsibilities:[13]

- A law clerk gains practical experience as an assistant to a judge.
- Although law clerks' responsibilities vary by area and judge, most clerks' jobs include a certain amount of legal research, preparing memos, writing orders and opinions, proofreading the judge's orders and opinions, communicating with attorneys regarding court procedure, assisting the judge in the courtroom, and maintaining the judge's library.
- A law clerk attends private meetings with the judge in chambers, often meeting with the case's attorneys and offering the judge an opinion.

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[12] http://www.manatt.com/attorneys.aspx?id=3003.

[13] http://www.courttv.com/careers_justice/career_track/list/law_clerk.html.

- The function of a law clerk is to aid in the processing of assigned cases and may be called on to perform any task.
- Judges traditionally hire new or recent law school graduates who serve most often for one or two years; it is important to note that there is no real career advancement as a law clerk because the term is so short. However, experience as a law clerk reflects very favorably upon a lawyer applying for future jobs as attorneys or judges.

Had Boone been made aware of the fact that she would be fighting against a Defendant whose employee (now Partner) had a previous, direct, personal and close connection/working relationship with the Judge responsible for ruling on whether his employer would go to trial in a multimillion dollar copyright claim prior to filing the case, Boone would have never wasted her family's hard earned $100,000. It would have been clearly apparent that she would be in a no win situation. Or, had Boone been advised of this relationship prior to oral argument, Boone would have demanded the immediate recusal of Judge Kearse from this case; an action that should have been voluntarily done by Judge Kearse if the Court were to, truly, be interested in the fair, just and unbiased administration of justice.

This complaint was filed prior to the Court of Appeals' ruling and is documented in Pro-Se Plaintiff's docket sheet;[14] yet went unaddressed and ignored by the Courts

[14] Entry 2/8/07, *Tr.* Public Docket for Second Circuit Court of Appeals.

despite numerous calls to the Court protesting this finding.

Plaintiff has since filed a Judicial Misconduct Complaint with the 2nd Circuit which has been duly registered under 07-9012-jm.

6. The Supreme Court ruled, in January 2006, that unpublished opinions can be cited in legal briefs. Despite the Court of Appeals' full knowledge of this ruling and their acknowledgment that the District Court's opinion was legally flawed, why would this opinion not be published? Publishing the opinion would ensure that the same legally flawed errors are not relied upon by others referring to the *Boone v. Jackson* case for legal precedent.

Thus the question before the Court:

> Should the Court of Appeals be required to publish opinions that clearly admit legally flawed District Court analyses on major issues to ensure that similar errors are not relied upon by counsel in future cases?

CONCLUSION

The periodic review of copyright cases is essential to ensure that the lower Courts are mindful that checks and balances will, periodically, take place to ensure Plaintiffs are receiving their basic Seventh Amendment right to a fair, unbiased, legally sound trial and consistent analysis of the fact issues presented before the courts.

The last copyright case reviewed by the Supreme Court was over a decade ago. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

Boone v. Jackson contains numerous issues of fact that affect several cases filed subsequent to her claim (against some of the Defendants in the instant case) and others that will follow. If a case, such as Boone's, with the numerous and most essential lyrical and musical similarities, is allowed to remain dismissed, there is clearly no point in any artist filing a copyright claim against multi-millionaire/international artists. All creative works of Independent artists are, hereby officially declared "free for the taking."

If such practices are allowed to continue without periodic review of the decisions being made in the lower courts, the entire democratic process is threatened and judges will be able to get away with abandoning legal principles in favor of specific results for certain, multimillionaire, defendants with relationships and resources unavailable to laypersons.

In this case, the pleadings, depositions, expert reports, answers to interrogatories and admissions clearly present triable issues of fact for the jury to resolve. And, since it is apparent that both Courts cannot correctly, and most importantly should not have, interpreted the material facts of this case, it is clear that these fact issues should be left to an unbiased jury of Plaintiff's peers who have no direct or former affiliation/relationship to Defendants.

Moreover, in determining whether a genuine issue has been raised, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Donahue* at 57. See also *Merritt Forbes & Co. v. Newman Investment Securities, Inc.*, 604 F.Supp. 943, 952 (S.D.N.Y. 1985).

It is clear that this standard has not been applied in the above case and a writ of certiorari should be granted to prevent the abuses documented in all cases of this nature in the future.

Respectfully submitted,

CARLA B. BOONE
c/o HOLLA'BACK RECORDS, ENT. . . LLC
P.O. Box 970
Tyrone, GA 30290
(678) 634-2904

2006 Fed.Appx. 30

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York on the 15th day of November, two thousand and six.

Present:

HON. AMALYA L. KEARSE,
HON. SONIA SOTOMAYOR,
HON. ROBERT A KATZMANN,
Circuit Judges.

Carla B. Boone,

Plaintiff-Appellant,

v.

05-5558-cv

John D. Jackson, professionally known as Fabolous, Pharell L. Williams, Charles E. Hugo, Elektra Entertainment Group, Inc., Desert Storm Records, Inc., EMI

April Music, Inc., EMI Blackwood Music Publishing, Inc., J. Brasco Publishing, Inc., also known as D. Brasco, Warner Music Group, Inc., and WEA Inc.,

Defendants-Appellees.

For Plaintiff-Appellant: CARLA B. BOONE, *pro se*, Tyrone, Georgia

For Defendants-Appellees: Gregory A. Clarick, Manatt, Phelps & Phillips, LLP, New York, New York, *for Defendants-Appellees EMI April Music, Inc.*, and *EMI Blackwood Music Publishing, Inc.*

CYNTHIA ARATO, Gibson, Dunn & Crutcher LLP, New York, New York, *for Defendants-Appellees John D. Jackson p/k/a "Fabolous," Pharell L. Williams, Charles E. Hugo, Elektra Entertainment Group, Inc., Desert Storm Records, Inc., J. Brasco Publishing Inc. (a/k/a D. Brasco), Warner Music Group Inc.* and *WEA Inc.*

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be and hereby is **AFFIRMED.**

Plaintiff-appellant Carla B. Boone, *pro se*, appeals from the June 30, 2005 decision of the United States District Court for the Southern District of New York (Daniels *J.*), *Boone v. Jackson*, No. 03 Civ. 8661, 2005 WL 1560511 (S.D.N.Y. July 1, 2005), granting defendants-appellees'

motion for summary judgment in her action alleging copyright infringement. We assume the parties' familiarity with the underlying facts and the procedural history of this case.

Plaintiff argues that the district court improperly dismissed her copyright claim with respect to two versions of her song "Holla Back"[1] because (1) in its "probative similarity" analysis, the court wrongly "hyperdissected" the songs at issue into protectable and non-protectable elements instead of considering the songs as a whole and (2) there were issues of material fact whether "substantial similarities" existed between the songs such that an ordinary observer would recognize an appropriation of plaintiff's song by defendant.

At the outset, we note that the district court opinion is at times unclear as to which similarity analysis – probative or substantial – it was undertaking. The court correctly noted that a copyright claim requires both proof of (1) actual copying, which a plaintiff may establish by demonstrating probative similarity, and of (2) improper use, which requires substantial similarity, *see Repp v. Webber*, 132 F.3d 882, 889 & n.1 (2d Cir. 1997), but it

[1] We note that the district court appears to have considered only one of the two versions of "Holla Back" upon which plaintiff rests her copyright claims because Boone had not registered the sound recording of the second version with the United States Copyright Office until June 9, 2004. *Boone*, 2005 WL 1560511, at *1 n.1; *see* 17 U.S.C. § 411(a) (providing no federal jurisdiction over an infringement action until "registration of the copyright claim has been made in accordance with this title"). While there are questions as to whether plaintiff's belated registration cured this jurisdictional issue, it would not affect the analysis that follows in any way because our findings with respect to both versions of plaintiff's song would be the same.

appears to have confused the distinction – and hence the analysis – between the two at a few junctures in its opinion. Nevertheless, after a *de novo* review of the district court's decision as well as the record, *Feingold v. New York*, 366 F.3d 138, 148 (2d Cir. 2004), including the experts' reports and audio recordings of both "Holla Back" and "Young N," viewed in the light most favorable to plaintiff, this Court agrees with the district court that defendants did not infringe Boone's copyright, although we do not, as explained below, adopt all of the district court's reasoning.

As to plaintiff's first argument, our precedent makes clear that "dissection" of a work in terms of, *inter alia*, its lyrics, harmony, or structure, is often required in the probative similarity context to determine whether a defendant has actually copied a plaintiff's work, *see Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), and even plaintiff herself submitted expert testimony that dissected the songs at issue. *See Repp*, 132 F.3d at 889 (noting expert testimony as method of demonstrating probative similarity). We agree with plaintiff, however, that in undertaking the probative similarity analysis, the district court erred by dissecting the works into protectable and non-protectable elements and then comparing the protectable elements for similarities because such an analysis is appropriate to the substantial similarity context. *Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp.*, 25 F.3d 119, 123 (2d Cir. 1994) ("In the context of deciding whether the defendant copied at all (as distinguished from whether it *illegally* copied), '[probative] similarity' relates to the entire work, not just the protectible elements."); *see*

also 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.01[B] (2005).[2] Nevertheless, the district court appears to base its decision on the permissible ground that the plaintiff's expert conceded the alleged similarities at issue are different and dissimilar, thereby weakening plaintiff's argument that defendant copied her work. *Boone*, 2005 WL 1560511, at *3-*4. Plaintiff's expert claimed that defendants' song shared three fundamental similarities with "Holla Back," which evidenced actual copying: (1) the position of the phrase "holla back" in the hook, or chorus, of the song; (2) the rhythmic construction of the phrase, specifically the eighth-note, eighth-note, quarter-note syncopation and its instrumentation; and (3) the nature and quality of the lyric's repetition in the hook, particularly the call and response element. But a review of the deposition transcript reveals that plaintiff's expert undermined his own conclusions by conceding, *inter alia*, that the hook in both songs have different lyrics; that the rhythmic constructions are different in that Holla Back varies the beat and vocalization pattern of the "holla back" phrase while Young N does not; that the bass instrumentation of the defendants' hook does not share length, pitch, and rhythm with plaintiff's hook; and that the call and

[2] We are mindful that probative similarity *does* permit the dissection of the work on other grounds, such as structure, harmony, lyrics, and instrumentation and that expert testimony may dissect two works to elucidate where the two are similar to an extent that suggests actual copying. *See, e.g., McDonald v. Multimedia Entm't, Inc.*, No. 90 Civ. 6356(KC), 1991 WL 311921, at *2 (S.D.N.Y. July 19, 1991) ("Evidence admissible on the issue of 'probative similarity' includes expert testimony 'dissecting' the two works and discussing the works' relationships to other earlier works, for the purpose of illuminating whether similarities between the two works are more likely due to copying or independent creation.")

response applied only generically to the two songs and was executed in defendants' song "in a different way and to varying degrees." There is no probative similarity where an expert concedes that allegedly similar music elements, alleged to have been copied, were in fact different. *See, e.g., Johnson v. Gordon*, 409 F.3d 12, 21-23 (1st Cir. 2005); *cf. Attia v. Soc'y of the N.Y. Hosp.*, 201 F.3d 50, 58 (2d Cir. 1999) ("Where, as here, a defendant's work is dissimilar in the very respects in which it is claimed to be similar, that can obviously influence the conclusion as to whether the claimed similarity in fact exists or is substantial."). Thus, we find that as a matter of law no probative similarities between "Holla Back" and "Young N" exist.

As to plaintiff's second argument, assuming *arguendo* that plaintiff had demonstrated probative similarity and hence actual copying, we agree with plaintiff that the district court misapplied our precedent in undertaking the substantial similarity analysis, but that error does not mandate reversal. The court below seems to have employed the "more discerning ordinary observer test" discussed in *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003 (2d Cir. 1995), from which the district court concluded that in examining the works at issue to determine whether improper use has occurred, it must extract unprotectable elements "from consideration to determine if the protectable elements standing alone, are substantially similar." *Boone*, 2005 WL 1560511, at *3 (citing *Knitwaves*, 71 F.3d at 1002). In *Knitwaves*, however, we expressly cabined the broad application of this standard, *see* 71 F.3d at 1003, and our subsequent decisions have emphasized that "[i]n applying this test, a court is not to dissect the works at issue into separate components and compare only the copyrightable elements," *Boisson v. Banian, Ltd.*, 273 F.3d

262, 272-73 (2d Cir. 2001). Instead, a "court, confronted with an allegedly infringing work, must analyze the two works closely to figure out in what respects, if any, they are similar, and then determine whether these similarities are due to protected aesthetic expressions original to the allegedly infringed work, or whether the similarity is to something in the original that is free for the taking." *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134-35 (2d Cir. 2003). This is because a defendant may infringe a copyright not only by literally copying a portion of a work, but also by "parroting properties that are apparent only when numerous aesthetic decisions embodied in the plaintiff's work of art . . . are considered in relation to one another." *Id.* at 134.

Under this standard, we agree with the district court's analysis that in examining only the protected elements, there was as a matter of law no substantial similarity between any protectable portion of plaintiff's and defendants' respective songs. Indeed, it is well-established that common phrases are not protectable under copyright, *see, e.g.*, *Acuff-Rose Music, Inc. v. Jostens, Inc.*, 155 F.3d 140, 144 (2d Cir. 1998) (finding the phrase "you've got to stand for something, or you'll fall for anything" too common to accord copyright protection), and undisputed evidence supported the district court's finding that "holla back" was one such phrase. Defendants, for instance, produced a list of over 30 songs that detailed the mainstream and widespread use of "holla back" in popular American music at around the same time plaintiff's song was recorded and released, and even plaintiff's expert admitted that the phrase "holla back" spoken in an eighth-note, eighth-note, quarter-note pattern could not be deemed original.

The district court erred, however, in not considering whether the defendant "parrot[ed] properties that are apparent only when numerous aesthetic decisions embodied in the plaintiff's work of art – the excerpting, modifying, and arranging of public domain compositions, if any, together with the development and representation of wholly new motifs and the use of texture and color, etc. – are considered in relation to one another." *Einstein Moomjy, Inc.*, 338 F.3d at 134. Guided by a common sense inquiry of the works as a whole, *Boisson*, 273 F.3d at 273, we find the combination of elements in each work is distinct. There is undisputed evidence that the songs' respective structures, lyrics, and harmonies are all different, and as our probative similarity discussion above makes clear, plaintiff's own expert conceded numerous differences in the very similarities alleged to exist between the works. *See Attia*, 201 F.3d at 57-58 (affirming grant of summary judgment where defendant's work had numerous differences in the very elements in which it was alleged to be similar). There is, therefore, no substantial similarity between the songs "Holla Back" and "Young N." As such, plaintiff could not establish as a matter of law the elements required to prove an infringement claim.

Accordingly, for the reasons above, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:
Thomas Asreen, Acting Clerk

By: Richard Alcantara, Deputy Clerk

2005 WL 1560511

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CARLA B. BOONE,

Plaintiff,

-against-

JOHN D. JACKSON, p/k/a "FABOLOUS," PHARELL L. WILLIAMS, CHARLES E. HUGO, ELEKTRA ENTERTAINMENT GROUP, INC., DESERT STORM RECORDS, INC., EMI APRIL1 MUSIC, INC., EMI BLACKWOOD MUSIC PUBLISHING, INC., J BRASCO PUBLISHING, INC., WARNER MUSIC GROUP, INC., and WEA, INC.,

Defendants.

03 CV 8661 (GBD)
MEMORANDUM
OPINION AND ORDER

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GEORGE B. DANIELS, District Judge:

Plaintiff brings suit asserting copyright infringement of her song "Holla Back" by defendants' song "Young N." Defendants moved for summary judgment pursuant to Fed.R.Civ.P. 56 and seek the imposition of sanctions under Fed.R.Civ.P. 11 arguing that plaintiff's infringement action is frivolous and indefensible. For the reasons stated below, defendants' motion for summary judgment is granted. The application for the imposition of sanctions is denied.

BACKGROUND

Plaintiff, Carla B. Boone, is a member of Holla' Back Records & Entertainment, LLC and is in the business of producing and recording hip-hop and rap artists. Defendants, John D. Jackson p/k/a "Fabolous," Pharell L. Williams, Charles E. Hugo, Elektra Entertainment Group Inc., Desert Storm Records Inc., EMI April Music Inc., EMI Blackwood Music Publishing Inc., J. Brasco Publishing Inc., Warner Music Group Inc., and WEA Inc. (collectively, "defendants"), are various songwriters, recording artists, record producers, and music publishing companies that created, recorded, and sold the song titled "Young N" for rap artist Fabolous.

The history of plaintiff's song, "Holla Back," begins in January 1999, when as a publisher for Holla Back Records, she entered into an exclusive songwriter contract with Trilain A. Smith ("Smith") and Anthony Wells ("Wells"). Under the contract, Wells and Smith, who are professionally known as the rap group Trajik, assigned all rights and interests in their musical composition, "Holla Back," to Boone. Later in 1999, plaintiff released a commercial audio cassette and compact disk of Trajik performing "Holla Back." On March 29, 1999, Boone registered the musical composition with the U.S. Copyright Office. Plaintiff also registered Trajik's commercial release of "Holla Back" as a sound recording with the U.S. Copyright Office on June 9, 2004.[1]

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[1] Although plaintiff asserts the infringement of two separate copyrights, one for the musical composition dated March 29, 1999 and the other for the sound recording dated June 9, 2004, she cannot assert that defendant's song, which was released in 2001, violates a copyright that was registered in 2004. *See* 17 U.S.C. § 411(a) (1996) ("no action for

(Continued on following page)

In September 2001, defendants released the compact disc of rap artist Fabolous, titled "Ghetto Fabolous." The album, which featured a song co-written by defendants Fabolous, Williams, and Hugo titled "Young N," sold over one million copies. Plaintiff maintains that after the release of "Young N," she received numerous calls from individuals congratulating her on the success of the song. She contends that many of these callers mistakenly believed that Fabolous recorded the copyrighted work written by Trajik.

Plaintiff filed suit on November 3, 2003 claiming that defendants' song "Young N" infringed her copyrighted work in violation of the Copyright Act of 1976, 17 U.S.C. § 106 and § 501. Specifically, she asserts that "Young N" features a "hook"[2] containing a repetition of the lyric "holla

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infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title"); *see also Lennon v. Seaman*, 84 F.Supp.2d 522, 524 (S.D.N.Y.2000) (noting that copyright registration is a jurisdictional perquisite to filing an infringement action).

[2] A hook refers to the most identifiable phrase within a popular song, and is usually associated with the title lyrics. It is usually the songs most important single feature.

In this case, the hook of "Young N" is:

Holla back Young'n (Hoooo Hoooo!)
Holla back (Hoooo Hoooo!)
Holla back Young'n (Hoooo Hoooo!)
Holla back (Hoooo Hoooo!)
Holla back Young'n (Hoooo Hoooo!)
Holla back (Hoooo Hoooo!)
Holla back Young'n (Hoooo Hoooo!)
Holla back (Hoooo Hoooo!)

The hook of "Holla Back" is:

Heard a hot track it's,
Holla Back

(Continued on following page)

back" which is similar in phrasing and musicality to her copyrighted work. In support, plaintiff offers her expert witness's testimony for the proposition that the expression "holla back" in the Fabolous recording is similar to the Trajik recording because of (1) its position in the chorus or the hook of each song; (2) the rhythmic construction of the phrase; and (3) the specific nature and quality of the lyric's repetition in the hook.

Defendants argue that the plaintiff's infringement claims fail because there are no actionable similarities between "Young N" and "Holla Back." In support, defendants offer their expert witness's testimony which concludes that few similarities exist between the two songs to support a copyright infringement claim. Defendants' expert witness found that the only similarities between "Holla Back" and "Young N" are the (1) repeating lyrics, "Holla Back," in a naturally spoken three-note rhythm in the respective choruses and (2) a commonplace syncopated three-note rhythm. Their expert witness concluded that because few similarities exist between the songs, and because the similarities that are present are commonplace

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If you built for big stacks it's,
Holla Back
If you floss big chains it's,
Holla Back
Holla Back Holla Back Where you at? C'mon!
If you heard a hot track it's,
Holla Back
If you floss big chains it's,
Holla Back
If you built for big stacks it's,
Holla Back
Holla Back Holla Back Where you at? C'mon!

within the rap genre, plaintiff's copyright infringement claim lacks merit.

COPYRIGHT INFRINGEMENT

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Nebraska v. Wyoming,* 507 U.S. 584, 590, 113 S.Ct. 1689, 1694, 123 L.Ed.2d 317 (1993). The burden of demonstrating that no factual dispute exists is on the moving party. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986). Once the moving party has met this burden, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). In deciding a motion for summary judgment, a court must resolve all ambiguities and draw all reasonable inferences in favor of the party opposing the motion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment should be granted only when no reasonable trier of fact could find in favor of the nonmoving party. *Gallo v. Prudential Residential Services, Ltd.,* 22 F.3d 1219, 1224 (2d. Cir. 1994).

In order to establish copyright infringement, two elements must be proven: (1) ownership of a valid copyright and (2) unauthorized copying of the copyrighted work, *Jorgensen v. Epic/Sony Records,* 351 F.3d 46, 51 (2d Cir. 2003). A certificate of registration from the United States Register of Copyrights constitutes *prima facie*

evidence of the valid ownership of a copyright. *See* 17 U.S.C. § 410.[3]

To satisfy the second element of an infringement claim, a plaintiff must show that her work was "actually copied" and that the portion copied amounts to an improper or unlawful appropriation. *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 137 (2d Cir. 1998). Because evidence of actual copying is rare, copying may be established by indirect evidence. *See Boisson v.. Banian, Ltd.*, 273 F.3d 262, 267 (2d Cir. 2001). Establishing actual copying circumstantially requires a plaintiff to show that the defendant had access to the copyrighted work and that substantial similarities exist between the defendant's work and the protectable elements of the plaintiff's work. *See Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996); *see also Knitwaves, Inc., v. Lolltytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995). Proof of actual copying may also include weighing expert testimony. *See Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992). Expert testimony may include "'dissecting' the two works and discussing the works' relationship to other earlier works, for the purpose of illuminating whether similarities between the two works are more likely due to copying or independent creation." *McDonald v. Multimedia Entm't, Inc.*, 1991 WL 311921, *2 (S.D.N.Y. July 19, 1991).

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[3] Plaintiff's expert compared the copyrighted sound recording of "Holla Back," dated June 9, 2004 to defendants' song "Young N" released in 2001. Plaintiff does, however, assert that five similarities exist between her copyrighted musical composition dated March 29, 1999 and defendants' song "Young N," released in 2001.

The plaintiff must show that the copying amounts to an improper or unlawful appropriation by demonstrating that substantial similarities exists between the two works.[4] *Laureyssens,* 964 F.2d at 140. To establish unlawful appropriation, courts employ the ordinary observer test. *Knitwaves,* 71 F.3d at 1002. This standard asks whether an "ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same." *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.,* 274 F.2d 487, 489 (2d Cir. 1960); *Knitwaves,* 71 F.3d at 1002. Additionally, "when determining 'substantial similarity,' the finder of fact is constrained to look at the work as a whole, without dissection as an ordinary lay observer would." *Tienshan, Inc., v. C.C.A. Int'l, Inc.,* 895 F. Supp 651, 658 (S.D.N.Y. 1995). Where works are compared that contain both protectable and unprotectable elements, examination of the work must be more discerning; unprotectable elements must be extracted from consideration to determine if the protectable elements standing alone, are substantially similar. *Knitwaves,* 71 F.3d at 1002. If points of dissimilarity between two works exceed those that are similar, a finding of no infringement is appropriate. *See Rogers v. Koons,* 960 F.2d 301, 308 (2d Cir. 1992). Once a plaintiff successfully makes a prima facie showing of copyright infringement, evidence of independent creation is an affirmative defense and may be introduced to rebut the claim. *Repp v. Webber,*

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[4] Copyright infringement claims involve consideration of similarity at two different stages of the analysis – actual copying and improper appropriation. The Second Circuit has noted that the term "probative similarity" should be used when referring to the initial burden of proving copying by establishing access and/or similarities. *See Repp v. Webber,* 132 F.3d 882, 889 FN 1 (2d Cir. 1997).

132 F.3d 882, 889 (2d Cir. 1997); *Tienshan,* 895 F.Supp. at 657.

Because the defendant concedes a showing of access for purposes of summary judgment, the critical issue in this case is whether substantial similarities exist between the two works as a matter of law. Plaintiff primarily argues that the verbal utterances of "holla back" in the hook of the Trajik and Fabolous songs are identical in construction because they are rapped in the same rhythmic pattern. Plaintiff also contends that "Holla Back" and "Young N" share similarities because the phrase "holla back" is followed by a repeated vocal response in each hook such as "back back" in the Trajik song and "young n woo woo" in the Fabolous song.

These arguments are unpersuasive. A comparison of the two works reveals that substantial similarities do not exist between the hook in the plaintiff's song and the hook in the defendant's song to support an inference of copying. Although "Holla Back" as a complete work is protected, not every element of the song is protectable per se. *See Rogers v. Koons,* 960 F.2d 301, 307 (2d Cir. 1992). The presence of the phrase "holla back," rapped in an eighth note, eighth note, quarter note rhythmic pattern in the hook of each song is too common to be protectable. *See Stratchborneo v. ARC Music Corp.,* 357 F.Supp. 1393, 1405 (S.D.N.Y. 1973) (holding that substantial similarity will not be found if only a small, common phrase appears in both the accused and complaining work; unless the reappearing phrase is especially unique or qualitatively important). Evidence proffered by the defendant noting the presence of the phrase "holla back" in numerous songs demonstrates the banal and therefore unprotectable nature of the phrase. *See Acuff-Rose Music, Inc. v. Jostens,*

Inc., 155 F.3d 140, 144 (2d Cir. 1998) (holding that prior usage of the phrase 'you've got to stand for something or you'll fall for anything' is sufficiently widespread and common to deny copyright protection).

Defendant's exhibit indicates that out of thirty-two songs found which contain the phrase "holla back," nine songs repeat "holla back" in the same rhythmic pattern used in "Holla Back" and "Young N," four songs predate the release of plaintiff's song, and five songs were released in the same year as plaintiff's song. The appearance of the phrase "holla back" in the Urban Dictionary further supports defendant's contention that the phrase is common and therefore unprotectable.[5] *See Exhibit 6.* Finally, plaintiff's expert's own admission that the phrase "holla back" rapped in an eighth note, eighth note, quarter note pattern is neither original nor unique undercuts a finding of substantial similarity.[6] It is black letter law that common phrases such as "Holla Back" are not protectable. *See Jean v. Bug Music,* 2002 WL 28776, *6 (S.D.N.Y. Feb. 27, 2002) (holding that a reasonable jury could only conclude that the lyrical phrase 'clap your hands now, people clap

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[5] As cited in the defendant's exhibit 6, the Urban Dictionary is an online dictionary which allows users to create and submit definitions of slang words and phrases for publication "Holla back" is defined as a "term [that] can be used as a goodbye greeting or when ending a conversation or at the end of trying to prove a point." *See http://www.urbandictionary.com/define.php?term=holla+back & f=1.*

[6] When plaintiff's expert was asked by the defendant's attorney whether "the writer of the plaintiff's song created the rhythmic pattern of saying the word [holla back] in an eighth note, eighth note, quarter note pattern," the expert replied that: "I'm not contending that." *Ramsey Depo.*, 14: 9-14. He also stated that: " . . . In my view, the rhythmic utterance [holla back] itself . . . could not be claimed as original." *Ramsey Depo.*, 14:18-20.

now' is not protectable by copyright law because it is a common phrase that often appears in church and secular music). Thus, where a comparison of the two works at issue show that the similarities relate only to non-copyrightable elements, as is the case here, courts have consistently held that summary judgment in favor of the defendant is appropriate. *See Ring v. Estee Lauder Inc.*, 874 F.2d 109, 110 (2d Cir. 1989); *See also Levine v. McDonald,* 735 F. Supp 92, 96 (S.D.N.Y. 1990).

Even if evidence of copying could be found, the plaintiff fails to satisfy the unlawful appropriation prong of the infringement test. Under the ordinary observer test, it is unlikely that an ordinary observer would regard plaintiff's song "Holla Back" and defendant's song "Young N" as aesthetically similar given their greater obvious differences. The two songs do not sound alike. This point becomes even more apparent when applying the heightened discerning observer test, as is required here, since plaintiff's work contains the unprotectable phrase "holla back" in combination with other protectable elements. Under this standard, aside from the common repetition of the phrase "holla back" in the hook of each song, the defendant's work taken as a whole, sounds quite different from plaintiff's copyrighted work.

Careful review of both "Holla Back" and "Young N" indicates that the songs differ in background instrumentation and lyrical content. Defendant's expert points out that the organ and "cuckoo" sounds heard in "Holla Back" are absent in "Young N."[7] He also maintains that the

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[7] *See Ferrara Rebuttal Report,* p. 24, claim 53 ("the organ and cuckoo mentioned in [plaintiff's expert report about] 'Holla Back' are not in 'Young N' . . . ").

synthesized flute heard in "Young N" is not present in "Holla Back."[8] Although plaintiff's expert initially disputed these differences, when deposed he conceded that the same background instruments are not used in "Young N" and "Holla Back."[9] Another difference between "Holla Back" and "Young N" resides in the lyrics. Aside from the hook containing the common and unprotectable phrase "holla back," it is undisputed that the verses of each song share no similarities. Thus, where points of dissimilarity between two works exceed those that are similar, as is the case here, a finding of no inffringement is appropriate. *See Rogers,* 960 F.2d at 308.

RULE 11 SANCTIONS

Defendants have moved for sanctions pursuant to Fed.R.Civ.P. 11. They seek attorneys' fees and costs from plaintiff's counsel, arguing that counsel, before pursuing this action, should have recognized that it was meritless after conducting a reasonable investigation. A pleading, motion or other paper violates Rule 11 either when it "has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well-grounded in fact

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[8] *See Ferrara Rebuttal Report,*. p. 24, claim 53 (" . . . the synthesized flute in 'Young N' is not in 'Holla Back' ").

[9] In plaintiff's expert report dated March 29, 2004, he asserts that: "In addition to a basic drumbeat in each [song], the instrumentation for each track is quite similar." *Ramsey Expert Report,* p. 3, paragraph 2. However, when plaintiff's expert was asked during his deposition by the defendant's attorney: "There's not an identical lineup of instruments that are used in the Trajik song versus the Fabolous song, correct?" He replied: "Correct." *See Ramsey Depo.*, 134:21-24; 135:19-25; 136:2-12.

and warranted by existing law. . . ." *W.K. Webster & Co. v. American President Lines, Ltd.*, 32 F.3d 665, 670 (2d Cir. 1994) (internal citations and quotations omitted). Sanctions should only be imposed "where it is patently clear that a claim has absolutely no chance of success." *Healey v. Chelsea Res., Ltd.*, 947 F.2d 611, 626 (2d Cir. 1991) (internal quotations and citation omitted).

In determining whether a Rule 11 violation has occurred, the court should use an objective standard of reasonableness. *See MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 73 F.3d 1253, 1257-58 (2d Cir. 1992) (internal citation omitted). Whether the attorney's conduct was reasonable should be determined without the benefit of hindsight, based on what was objectively reasonable to believe at the time the pleading, motion or other paper was submitted. *See Kamen v. AT & T*, 791 F.2d 1006, 1011-12 (2d Cir. 1986). "Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion or other paper; whether the pleading, motion or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar." *Id.* at 1012. In addition, attorneys are entitled to rely on the objectively reasonable representations of their clients. *See Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1329-30 (2d Cir. 1995). All doubts must be resolved in favor of the signer of the pleading. *See Rodick v. City of Schenectady*, 1 F.3d 1341, 1350 (2d Cir. 1993) (internal quotations and citations omitted).

The Supreme Court has cautioned that Rule 11 "must be read in light of concerns that it will . . . chill vigorous

advocacy." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990); *see also MacDraw, Inc.*, 73 F.3d at 1259. "[J]udges should always reflect seriously upon the nuances of the particular case, and the implications the case has on the nature of the legal representation, before imposing sanctions." *Thompson v. Duke*, 940 F.2d 192, 195 (7th Cir. 1991).

The record does not support a finding that this case was interposed for any improper purpose or that there was no reasonable basis for plaintiff's counsel to believe that plaintiff's allegations were grounded in fact when counsel filed the complaint. Defendants' Rule 11 motion is denied.

CONCLUSION

There are significant and sufficient differences in plaintiff's and defendants' songs to preclude a finding of copyright infringement. Defendants' motion for summary judgment is granted and defendants' motion for sanctions is denied.

Dated: New York,
New York
June 30, 2005

SO ORDERED:

/s/ George B. Daniels
GEORGE B. DANIELS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date: March 14, 2007

Docket Number:	05-5558-cv
Short Title:	Boone v. Jackson
DC Docket Number:	03-cv-8661
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable George Daniels

(Filed Mar. 14, 2007)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 14th day of MARCH two thousand seven.

Present:

Hon. Amalya L. Kearse,

Hon. Sonia Sotomayor,

Hon. Robert A. Katzmann,

CIRCUIT JUDGES,

BOONE v. JACKSON

A petition for panel rehearing having been filed herein by Carla Boone

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

For the Court,

Thomas Asreen, Acting Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney

Swirsky v. Carey

376 F. 3d 841 (9th Cir. 2004)

Complaining Work	Defending Work
Seth Swirsky and Warryn Campbell	Mariah Carey
"One of Those Love Songs"	"Thank God I Found You"
Hear Sound Recording	Hear Sound Recording

* * *

In this circuit, the definition of originality is broad, and originality means "little more than a prohibition of actual copying." Three Boys, 212 F.3d at 489 (quoting North Coast Indus. v. Jason Maxwell, Inc., 972 F.2d 1031, 1033 (9th Cir. 1992)). All that is needed to satisfy originality is for the author to contribute "something more than a 'merely trivial' variation." Id. Carey attempts to rebut Swirsky's presumption of originality by demonstrating that the first measure of One's chorus is "substantially similar" to the first measure of Jolly Good.[22] ***The test for originality, however, is not substantial similarity. Instead, a work will be considered original so long as the author of the later work contributed something more than a "merely trivial" variation to the particular expression.*** Although the first measure of One's chorus and the first measure of Jolly Good may share the same pitch sequence, they are not identical in meter, tempo, or key. There is, therefore, a triable issue

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[22] Carey also argues that the first measure of One is substantially similar to the first measure of Bear Went. Because Bear Went is exactly the same musically, albeit not lyrically, to Jolly Good, the comparison of One to Jolly Good applies with equal force to the comparison between One and Bear Went as well.

whether there are more than "merely trivial" differences between the two works. Carey's contention that the first measure of Swirsky's chorus is not original as a matter of law fails.

Carey next argues that the first measure of One is a mere "musical idea," not protectable under the Copyright Act. Carey relies on Dr. Walser's testimony that the first measure of One was a "short musical idea." Carey's reasoning is fallacious for a number of reasons, the most basic being that a musicologist is not an expert on what the term "idea" means under the copyright laws. Labeling something as a "musical idea" does not necessarily bear on whether it is also an "idea" under the copyright laws and unprotectable for that reason.

No federal court has stated that a musical motive is not protectable because it is an idea. Nor does the "musical idea" of the first measure of Swirsky's chorus lack protection because of its brevity. Although it is true that a single musical note would be too small a unit to attract copyright protection (one would not want to give the first author a monopoly over the note of B-flat for example), an arrangement of a limited number of notes can garner copyright protection. See Elsmere Music, Inc. v. Nat'l Broad. Co., 482 F. Supp. 741, 744 (S.D.N.Y. 1980) (finding that four notes were substantial enough to be protected by copyright); Santrayll v. Burrell, 1996 U.S. Dist. LEXIS 3538, 1996 WL 134803, at *2 (S.D.N.Y. Mar. 25, 1996) (mem. order) (finding that the repetition of the word "uh-oh" four times in a distinctive rhythm for one measure is sufficiently original to render it protectable under the copyright laws). This

Court has stated that "even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity." Baxter v. MCA, Inc., 812 F.2d 421, 425 (9th Cir. 1987). The melodic line in the first measure of One is seven notes long. It cannot be said as a matter of law that seven notes is too short a length to garner copyright protection. We therefore reject this challenge to the protection of the first measure of One's chorus.

* * *